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No. OFFICE OF THE CLERK

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IN THE  
SUPREME COURT OF THE UNITED STATES

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THE BOEING COMPANY,

*Petitioner,*

vs.

VALENTINO ZUNIGA,

*Respondent.*

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PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does a plaintiff prove a *prima facie* case of age discrimination in the reduction-in-force context by simply identifying a single younger, less experienced employee who was treated more favorably than the plaintiff?
2. Is an employer's use of subjective criteria in selecting employees for layoff inherently suspect, entitling a juror to disbelieve the employer's uncontradicted evidence that it relied on such criteria?
3. Is summary judgment precluded whenever criticisms regarding an employee could be considered consistent with a stereotype?
4. May an employer's uncontroverted evidence be disregarded on summary judgment?
5. Does the admission of evidence of other layoffs require a threshold finding that the other laid off employees are similarly situated to plaintiff?
6. Must statistics be reliable in order to be considered admissible evidence of pretext?

**PARTIES TO PROCEEDING AND  
CORPORATE DISCLOSURE STATEMENT**

The parties to the proceeding are set forth in the case caption. The Boeing Company has no parent corporation, and no publicly-owned company owns ten percent or more of The Boeing Company.

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## OPINIONS BELOW

The June 7, 2005 opinion of the Tenth Circuit is unreported. It is reproduced in the Appendix at App. 1.a – 15.a. The February 26, 2004 opinion of the district court is likewise unreported and is reproduced in the Appendix at App. 16.a – 31.a. The February 26, 2004 judgment is unreported and reproduced in the Appendix at App. 32.a. The August 1, 2005, Order of the Court of Appeals for the Tenth Circuit denying Appellee's Petition for Rehearing En Banc is unreported and reproduced in the Appendix at App. 33.a.

## STATEMENT OF JURISDICTION

The Court of Appeals for the Tenth Circuit denied Appellee's Petition for Rehearing En Banc on August 1, 2005. App. at 33.a. The jurisdiction of this Court is conferred by 28 U.S.C. §1254(1).

## STATUTORY PROVISIONS INVOLVED

The statute construed is 29 U.S.C. §623(a), which provides in pertinent part: "It shall be unlawful for an employer – (1) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."

## STATEMENT OF THE CASE

Respondent, Valentino Zuniga, worked for Boeing as a Material Management Analyst until June 22, 2002, when he was laid off during the course of a company-wide reduction-in-force ("RIF"). In his position, Respondent was responsible for ensuring that tools and parts were available for on-time start up of assembly according to production schedules, maintaining inventory of parts, monitoring work orders to determine their adherence to production schedules, and identifying and communicating part shortages and/or constraints.

Following the September 11, 2001 terrorist attacks, Boeing experienced a decrease in its commercial airplane production and announced that it would be reducing its workforce company-wide by approximately thirty percent (30%). Boeing's Tulsa site had previously undergone a number of RIFs as a result of the decline in aerospace defense contracting work and had decreased its workforce from over 5,000 employees to 1,000 employees by the mid-1990's. As a result, the Tulsa

workforce was generally comprised of good performers, many of whom had survived prior reductions.

To accomplish the further reductions required after September 11, 2001, Boeing-Tulsa developed the Salaried Employment Reduction Process ("ERP") as a means of differentiating salaried employees with almost identical performance reviews and assessing employees relative to their peers. Employees were assessed relative to their peers in three areas and given a numeric ERP rating score. The first assessment measured ten competencies or skills that were identified as appropriate for the particular job group. The competencies accounted for sixty percent (60%) of the 100-point total numeric ERP score. The second assessment measured the employee's performance against business goals and objectives and amounted to twenty-five percent (25%) of the total ERP score. The third assessment measured the employee's performance in relation to Boeing's "Vision 2016" plan and supplied the remaining fifteen percent (15%) of the total ERP score.

Once the ERP assessments were complete, employees were ranked within their peer group from top to bottom according to their total numeric score. The applicable Skill Team consisting of the senior manager, his or her direct reports, and a human resources representative met to review and approve the final relative rankings. When reductions were declared within a specific job group, the employees with the lowest relative ranking were identified for layoff.

An ERP exercise was conducted in January 2002 for the Material Management Analysts, the results of which were used to identify employees for layoff in 2002 as excesses were declared for that job group. In total, there were twenty-three (23) Material Management Analysts, including Respondent. All of the Material Management Analysts – with the exception of Krista Harris (age 30) – were 40 years of age or older. In accordance with the ERP, the seven (7) first-line managers who supervised the Material Management Analysts rated their direct reports pursuant to the ERP criteria. Respondent's first-line manager, David Reid, gave Respondent a total ERP score of 64.40, which resulted in Respondent being ranked 21 out of 23. Reid gave Harris an almost identical ERP score of 64.70. Reid gave Ron Jaggars (age 52) a total ERP score of 86.4, which resulted in his being ranked 6<sup>th</sup> out of 23.

Reid testified that Respondent's score was based on his observations that Respondent failed to perform transactions necessary to maintain accurate inventory, he refused to utilize tools which could possibly enhance his job performance, and he failed to be proactive in his

communications with customers. Both Respondent and the Skill Team members, who reviewed the relative rankings, acknowledged incidents in which Respondent did not accurately maintain inventory or failed to communicate.

A layoff of three Material Management Analysts was declared in January 2002. Jerry Wallingford (age 59), who was ranked last, retired effective January 1, 2002. David Watkins (age 46), who was ranked 22<sup>nd</sup> out of 23, was issued a 60-day layoff notice and was laid off effective March 23, 2002. Additionally, Harris, who was ranked just above Respondent, was identified for layoff. Respondent was by-passed and Harris was laid off ahead of Respondent due to the fact that Harris' ERP score was nearly identical to Respondent's score and because Respondent had more years of service. Harris, however, was successful in finding another job in a different job classification in a different organization at a reduction in pay.

A second excess of Material Management Analysts was declared in March 2002. Respondent, I. B. Johnson (age 48) (ranked 19<sup>th</sup>), and James Hobkirk (age 42) (ranked 18<sup>th</sup>) were identified for layoff. Johnson's layoff was subsequently cancelled due to an increase in workload in Johnson's function. Hobkirk's layoff was also cancelled after a production manager offered to reduce headcount by one in his organization in order to maintain the level of support in the area of military spares, a function of Hobkirk's. Respondent was laid off effective June 22, 2002. He was 62 years old at the time. Six Material Management Analysts who were retained were 50 years of age or older, including a 60-year-old.

## REASONS FOR GRANTING THE PETITION

- I. **The Tenth Circuit's Decision That A *Prima Facie* Showing Is Made Under The ADEA In The Reduction-In-Force Context Simply By Demonstrating That A Single Younger, Less Experienced Employee Was Treated More Favorably Adopts A Meaningless Formulation Of The *Prima Facie* Requirement Which Is Inconsistent With Other Circuits Requiring Additional Evidence That Age Was A Factor In The Layoff Decision.**

The Tenth Circuit found that in a reduction-in-force ("RIF") case, a plaintiff establishes a *prima facie* case simply by demonstrating that a single younger, less experienced employee was treated more favorably in the RIF. [App. at 4.a - 5.a] In doing so, the Tenth Circuit adopts a meaningless formulation of the *prima facie* requirement in RIF cases which effectively exempts plaintiffs in ADEA RIF cases from shouldering any